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No. 85-384 (2)

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

ANN BROWN,
Petitioner,

vs.

FERRO CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Regardless of whether the District Court and the Court of Appeals correctly decided that this case is not ripe, would the judgments of the courts below have to be affirmed based on the alternative *state law ground* for their judgments which has not been tendered to this Court by Petitioner?

2. Even if the state law ground had been tendered to this Court, should this Court grant certiorari to determine if the District Court and the Court of Appeals correctly decided an issue of Ohio law?

3. In a shareholder's derivative suit challenging severance agreements under which the beneficiaries' rights to any payment have not accrued and may never accrue, where the objections to those agreements are based on speculation as to future events, where it does not appear that the escrow provision of the agreements has caused any damage to the corporation but has conferred substantial benefits upon it, and where postponement of judicial consideration would not preclude adjudication of the issues if they ever become ripe, was it an abuse of the District Court's discretion to hold that the issues of this case are not currently fit for judicial decision?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reported at 763 F.2d 798 (6th Cir. 1985), is fully set forth in Petitioner's Appendix at 28a-44a. The Memorandum of Opinion and Order rendered by the District Court for the Northern District of Ohio, Eastern Division, on November 9, 1983, unreported, also is set forth fully in the Petitioner's Appendix at 1a-27a. The subsequent Memorandum of Opinion and Order by the District Court dated January 10, 1984, unreported, was omitted from the Petitioner's Appendix but is set forth in the Respondents' Appendix at A1-A3.

JURISDICTION

The jurisdictional prerequisites adequately appear in the Petition.

STATUTES INVOLVED

Contrary to the statement in the Petition, this case involves Sections 1701.41, 1701.60, 1701.78 and 1701.79 of the Ohio Revised Code, which are set forth herein in the Respondents' Appendix at A4-A13. No constitutional provisions, treaties, other statutes, ordinances or regulations are involved.

COUNTER-STATEMENT OF THE CASE

Petitioner, Ann Brown, as owner of ten shares of common stock of Ferro Corporation ("Ferro"),[1] an Ohio corporation, brought this suit as a shareholder's derivative action against Ferro, nominally, and each of the eleven individuals who were members of Ferro's Board of Directors ("directors") in 1981 and 1982. Ferro and each of the directors are Respondents herein. Federal court jurisdiction rests solely on diversity of citizenship and an amount in controversy of over $10,000 (28 U.S.C. § 1332).

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1. In accordance with Rule 28.1 of this Court, Respondent Ferro states that it has no parent company and that the following is a listing of all subsidiaries (except wholly owned subsidiaries) and affiliates of Ferro: Carboline/Ferro Powder Coatings Co.; Ferro-E.C.A. Electronics Co.; Eurostar S.A.; Ruhr-Pulverlack G.m.b.H.; Ferro Electronics B.V.; Metal Portuguesa S.A.R.L.; Ferro-Compostos Plasticos, Lda; Inmapin Priba, S.A.; Nutriplant I.C.L.; Ferro Ecuatoriana S.A.; De Mateo y Cia., S.A. de C.V.; Metquim, S.A. de C.V.; Quimica Colfer S.A. de C.V.; Ferro de Venezuela, C.A.; Ferro Coatings and Colours Limited; Ferro Enamels (Japan) Ltd.; Nissan-Ferro Organic Chemical Co. Ltd.; Nissan-Ferro Electronics Co. Ltd.; and Ferro Plastics (N.Z.) Ltd.

Although the complaint was much broader, the only issues pursued below by Petitioner involve certain agreements entered into in 1981 between Ferro and fourteen of its key executives ("Severance Agreements").[2] On November 9, 1983, the District Court filed a Memorandum of Opinion and Order which dismissed *without prejudice* all claims challenging the Severance Agreements. On June 7, 1985, the United States Court of Appeals for the Sixth Circuit affirmed.

Both the Court of Appeals and the District Court based their decisions on two *independent* and *distinct* grounds. First, the District Court exercised its discretion to dismiss the case because it was not ripe for adjudication under *federal law*. The Court of Appeals affirmed. (Petitioner's Appendix at 21a, 25a, 32a.) Second, and as an alternate ground based wholly on questions of *state law*, the courts below both held that Ferro had not suffered the damages which are a prerequisite to a shareholder's derivative suit as a matter of Ohio law. (Petitioner's Appendix at 18a, 37a.)

Petitioner seeks certiorari from the decision of the Court of Appeals but does not present in the Petition any

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2. After extensive discovery by Petitioner with respect to all issues set forth in the complaint, the directors and Ferro filed a joint motion for summary judgment on all claims or, in the alternative, to dismiss certain claims ("Joint Motion"). In responding to the Joint Motion, Petitioner stated in a memorandum filed on August 8, 1983, that she abandoned all claims except those challenging the 1981 Severance Agreements. The claims thus abandoned were dismissed by the District Court without prejudice in its Memorandum of Opinion and Order dated November 9, 1983. (Petitioner's Appendix at 1a-27a.) Pursuant to a timely motion under Rule 59, Federal Rules of Civil Procedure, on January 10, 1984 the District Court filed a Memorandum of Opinion and Order amending the November 9, 1983 Order to dismiss with prejudice one of the claims which had been abandoned by Petitioner. (Respondents' Appendix at A1-A3.) Before the Court of Appeals, Petitioner did not seek to raise any of the claims which she abandoned. Nor does she seek to do so before this Court.

question for review with respect to the Ohio law ground for the decisions below; indeed, both of the "Questions Presented" in the Petition deal expressly and exclusively with the federal law doctrine of ripeness. (Petition at i.)

As the District Court observed, the Severance Agreements (providing covered employees with cash payments if their employment at Ferro terminates within two years of a "change in control," as defined) were adopted at a time when Ferro was the subject of a possible takeover attempt which presented a threat that key employees would leave Ferro rather than face the personal uncertainties associated with the situation. (Petitioner's Appendix at 7a-8a.) However, that possible takeover attempt evaporated before Petitioner filed her complaint. Both of the courts below determined upon the record, and this is not disputed by Petitioner, that the payments are contingent upon a change in control at Ferro *and* that a change in control is not presently foreseeable. (Petitioner's Appendix at 18a, 37a.)

Thus, underlying both "Questions Presented" by the Petition is the fact that the covered employees' contingent right to receive Severance Agreement payments has not presently accrued and may never accrue. One may only speculate as to whether those contingent rights ever will arise and, if they do, what the surrounding circumstances will be.

Petitioner has not and cannot present facts to support her challenge to the Severance Agreements. Instead, Petitioner has proffered speculation—her own parade of horribles as to what *might* happen. As the Court of Appeals held:

> All of this speculation serves to highlight the fact that it is still unclear how these events will play out,

> and that judicial intervention at this time would be premature, as the case is not ripe for decision.

(Petitioner's Appendix at 36a.)

SUMMARY OF ARGUMENT

This is not a case in which the Court should grant certiorari. It is futile for Petitioner to seek review of the federal law ripeness issues when there is an alternate ground set forth in the decisions below based entirely on Ohio law. This Ohio law basis for the decisions was not placed before this Court in the Petition. *See infra* n.3. In any event, this Court does not grant certiorari in order to review lower federal court determinations on questions of state law.

Moreover, the federal law ground for the decisions below involves the exercise of discretion by the District Court under the ripeness doctrine, the only question being whether the District Court abused that discretion. There is no conflict with the decisions of this Court. There is no novel question of law involved. There is no conflict among the circuits.

REASONS FOR DENYING THE WRIT

A. The Decisions Below Are Founded Upon An Alternate Ground, Based Wholly On Determination Of Questions Of State Law.

There are two independent and distinct grounds for the decisions below. First, as the Court of Appeals held under federal law:

> judicial intervention at this time would be premature, as the case is not ripe for decision.

(Petitioner's Appendix at 36a.) Second, as the Court of Appeals also held, there is an alternate ground for the decision, based wholly on questions of state law:

> In addition, as the district court pointed out, Ohio law requires as a prerequisite to any shareholder's derivative suit that the corporation sustain damage as a consequence of the allege [sic, alleged] wrong. *Barson v. Pioneer Savings and Loan Co.*, 163 Ohio St. 424, 127 N.E.2d 614 (1955). Shareholder's derivative actions are governed by Rule 23.1 of the Federal Rules of Civil Procedure, and federal courts apply the law of the state in which the company is incorporated. *Burks v. Lasker*, 441 U.S. 471 (1979), *In re General Tire and Rubber Co. Securities Litigation*, 726 F.2d 1075 (6th Cir. 1984). Ferro is an Ohio corporation, and, as pointed out above, Ohio law requires proof of damages to the corporation before a shareholder's derivative action can be maintained.
>
> We agree with the lower court that Ferro has sustained no damages since any payments are contingent upon a change of control and a change of control is not presently foreseeable.
>
> Therefore, *because the case is not ripe for adjudication and because the corporation has suffered no damages,* the determination of the district court is AFFIRMED.

(Petitioner's Appendix at 37a) (emphasis added.)

Unless this Court reviews and reverses *both* the federal law ground and the alternate Ohio law ground, this Court cannot provide Petitioner with any meaningful relief from the judgments below. Even if the courts below did not correctly exercise their discretion under the federal law doctrine of ripeness (which we vigorously deny), the

Ohio law ground alone mandates affirmance of the lower courts' judgments dismissing Petitioner's case.[3]

This Court has consistently declined to review lower federal courts' decisions on state law questions. In *Cort v. Ash*, 422 U.S. 66 (1975), a shareholder's derivative suit, the plaintiff shareholder had dropped a pendent state law claim after the district court held that Pennsylvania law required him to post security for expenses as a prerequisite to proceeding with the state law claim. In refusing to reinstate the state law claim, the unanimous decision of this Court explained that:

> [T]his Court must necessarily depend upon the district courts and courts of appeals for initial determinations of questions of state law; indeed, our practice of deference to such determinations should generally render unnecessary review of their decisions in this respect. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 462 (1967); *Ragan v. Merchants Transfer Co.*, 337 U.S. 530, 534 (1949).

Id. at 73 n.6. *See also Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2800 (1985); *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("It is our practice to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.' "); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *Wolf v. Weinstein*, 372 U.S. 633, 636 (1963); *General Box Co. v. United*

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3. Both of the "Questions Presented" in the Petition for Writ of Certiorari deal expressly and exclusively with the federal law doctrine of ripeness. Accordingly, pursuant to Rule 21.1(a) of this Court, the Ohio law ground is not properly before the Court for consideration. Since Petitioner has failed to place issues before this Court which the Court must resolve if it is to provide Petitioner with meaningful relief, the Petition for Certiorari should be denied.

States, 351 U.S. 159, 165 (1956) ("We ordinarily accept the determinations of the Courts of Appeals on questions of local law, and we do so here."); *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 708 (1949) (same); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. . . .").

The granting of certiorari here, therefore, necessarily would involve this Court in a review of the lower courts' determinations of questions of Ohio law. Such determinations are best left to the "district courts and courts of appeals [which] are better schooled in and more able to interpret the laws of their respective States." *Brockett, supra*, 105 S. Ct. at 2800. On this ground alone, the Petition for a writ of certiorari should be denied.

B. The Decisions Below Are Wholly Consistent With The Decisions Of This Court On Ripeness.

Petitioner's vain attempt to create an issue possibly worthy of certiorari (albeit only on the federal law ground) is founded on the premise that the District Court, although affirmed completely by the Court of Appeals, misapplied its discretion under the ripeness doctrine.[4] As the Court well knows, in deciding questions of ripeness, its prior decisions hold that two principal factors must be considered:

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4. Petitioner also suggests that the doctrine of ripeness is not applicable unless a case involves a constitutional claim, a challenge to governmental action, or an attack on state legislation. (Petition at 14-15.) However, the distinguished treatise relied upon by Petitioner squarely contradicts such assertion. 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 2d §3532.1 at 120-21 (2d ed. 1984).

> The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967); *see also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). The decisions by both of the courts below certainly are well within the zone of discretion established by this Court's decisions on ripeness.

Initially, we note that Petitioner has conceded by her failure to argue the point that the issues hardly are fit for judicial decision. Under Ohio law, a trier of fact addressing the merits raised by Petitioner's claims would be required to determine if the Severance Agreements constitute "reasonable compensation." Ohio Revised Code Section 1701.60(A)(3) (Respondents' Appendix at A5-A6). *See, e.g., Murrell v. Elder-Beerman Stores Corp.*, 16 Ohio Misc. 1, 239 N.E.2d 248 (C.P. Mont. Cty. 1968) (under Ohio Revised Code Section 1701.60(A)(3), a pension adopted for the benefit of a company's president/chairman held valid when challenged after a change in control and when payments were due).

What facts has Petitioner proffered (after her extensive discovery efforts) to support the contention that these Severance Agreements are unreasonable? As the District Court found (and the Court of Appeals agreed), this lawsuit was commenced and it has been maintained during a time when there has been no actual or threatened change in control of Ferro. Thus, Petitioner has sought to challenge the Severance Agreements now in spite of the fact that no covered employee has had any expectation of receiving payments under the Severance Agreements. (Petitioner's Appendix at 18a, 37a.) For this reason, instead of being able to offer *facts* in support of her allegations atttacking

the Severance Agreements as unreasonable, Petitioner has proffered to the District Court, the Court of Appeals, and now this Court only speculative scenarios (for example, that employees will receive benefits after being fired for cause, or that employees will receive benefits while disclosing Ferro's proprietary information to its competitors). (Petition at 6-7.)

This rampant speculation was a primary reason for the decisions by the courts below to exercise their discretion to dismiss the Severance Agreement claims without prejudice. As the Court of Appeals commented:

> The fact that all sides have tended to speculate as to the future course of events also supports the district court's decision to decline jurisdiction at this time. Plaintiff suggests that a fabricated contractual "change in control" might be brought about by the officers themselves solely to collect severance benefits. The district court, on the other hand, suggested that a new board of directors might be inclined to challenge the validity of these payments on their own, or that the directors of Ferro might decide to alter significantly or even eliminate the current severance agreements before any change in control occurs, thus obviating the need for court intervention. All of this speculation serves to highlight the fact that it is still unclear how these events will play out, and that judicial intervention at this time would be premature, as the case is not ripe for decision.

(Petitioner's Appendix at 36a.) In short, the courts below correctly held that the claims should not be adjudicated until they are based on fact rather than fancy.

Although she has no issues presently fit for adjudication, Petitioner speculates that she has been precluded by the decisions below from challenging the Severance

Agreements "at any time" in the future and, accordingly, that she has suffered the type of hardship which favors present resolution of her claims. (Petition at 16-17.) Petitioner's claim of hardship is a red herring.

First, the District Court expressly dismissed the Severance Agreement claims *without prejudice*. (Petitioner's Appendix at 25a-27a.) In affirming, the Court of Appeals expressly held that "judicial intervention *at this time* would be premature, as the case is not ripe for decision." (Petitioner's Appendix at 36a) (emphasis added.) Thus, by their terms, neither of the decisions below perpetually bars litigation of the issues.

Second, Petitioner still will be a Ferro shareholder *after* a contractually-defined "change in control" occurs, unless she decided voluntarily to sell her ten shares.[5] As both courts below found, the Severance Agreements provide that a "change in control" shall be deemed to have occurred if (i) any person or group acting in concert becomes the beneficial owner of 25% of Ferro's then outstanding voting securities, or (ii) if certain changes occur to the composition of the board of directors over the course of two consecutive years. (Petitioner's Appendix at 9a n.2, 29a n.1.) Thus, it is wholly within Petitioner's power to continue as a Ferro shareholder should either or both of the events occur which constitute a change in control and, therefore, to continue to be in a position to

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5. It seems reasonably certain that Petitioner will hold on to her ten Ferro shares so long as the potential of further litigation exists. As the record in the court below establishes, Petitioner is or has been plaintiff in twenty derivative or class actions *in addition* to this case. No less than fourteen derivative or class actions against company directors (including the instant case) were filed during 1982 *alone* in courts from Maine to California with Petitioner named as plaintiff. Petitioner's penchant for litigation was commented upon in *Brown v. Hart, Schaffner & Marx*, 96 F.R.D. 64, 65 n.1 (N.D. Ill. 1982).

file a new shareholder's derivative suit challenging the Severance Agreements should her posited claims ever become ripe.[6]

Third, Petitioner will have ample opportunity to file another case if a merger of Ferro into another company should ever be proposed. Such a merger could not be effective unless and until the merger agreement had been adopted at a meeting of shareholders by the holders of at least two-thirds of Ferro's common stock. Ohio Revised Code Sections 1701.78(D), 1701.78(F) and 1701.79(D). (Respondents' Appendix at A6-A13.) Petitioner would be provided with advance notice of the meeting and its purpose. Ohio Revised Code Section 1701.41(A). (Respondents' Appendix at A4.) Thus even if a tender offer for Ferro stock were made and were successful and were to lead to a proposed merger, the provisions of Ohio law provide Petitioner with ample opportunity, while she is still a Ferro shareholder, to file suit and seek immediate injunctive relief to bar payments under the Severance Agreements.

Petitioner takes another tack in arguing that the unavailability of escrowed funds for unrestricted corporate use constitutes harm. This contention is contrary to a purely factual determination by the District Court with which the Court of Appeals agreed. As stated by the Court of Appeals:

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6. In arguing present "hardship," Petitioner's focus is askew. The cause of action she seeks to protect is not hers, but *Ferro's*. As Rule 23.1, Federal Rules of Civil Procedure plainly states, "a derivative action [is] brought by one or more shareholders . . . to enforce a right of a corporation. . . ." Thus, even if Petitioner ultimately becomes disqualified from representing the interests of the corporation, the cause of action now posited by Petitioner will continue to belong to the corporation; it may be pursued (or not pursued) if ever it becomes ripe, by those who are then responsible for the company's governance or, if they demur, by any shareholder. *See* 3B J. Moore & J. Kennedy, MOORE'S FEDERAL PRACTICE ¶ 23.1.16[1] (2d ed. 1985).

> The district court correctly concluded that the damage resulting from tying up these funds is nominal at best, as the corporation continues to receive a healthy return on its investment. These funds have not been lost to the corporation, but are actually being put to good use.

(Petitioner's Appendix at 35a-36a.)

This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also Superintendent v. Hill*, 105 S. Ct. 2768, 2777 (1985) (Stevens, J. concurring in part and dissenting in part). Moreover, "[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See also Berenyi v. District Director*, 385 U.S. 630, 635 (1967).

The findings below of only nominal damage, and some benefit, stand in sharp contrast to decisions of this Court where issues have been held not ripe for review, despite a present loss to plaintiff. Illustrative is *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), wherein electric utilities challenged two separate sections of a California statute on the grounds that they were pre-empted by the Atomic Energy Act. Significantly, both the District Court and the Ninth Circuit Court of Appeals held that *each* of the challenged sections imposed a direct burden and injury upon the utilities (by causing them to cancel plans to build nuclear plants), thereby giving them standing to maintain the suit. But, as the Ninth Circuit Court of

Appeals recognized, 659 F.2d 903 at 915, the fact of direct harm is not conclusive on the question of ripeness. To decide whether the issues are fit for present adjudication, the *Abbott* test, *see infra* p. 9, must be separately undertaken.

Despite the immediate impact and harm upon the utilities imposed by both of the challenged sections of the California Act, this Court held that the utilities' challenge to one of the sections (which provided that no additional atomic plants could be built until the California Energy Commission determined that there will be adequate interim storage of spent nuclear fuel) was not ripe for adjudication.

In performing the *Abbott* test, this Court implicitly found that the harm caused the utilities by refusing present adjudication of the "interim storage" provision was *outweighed* by the factor of uncertainty of future events:

> As the Court of Appeals explained, because "we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate," judicial consideration of this provision should await further developments.

461 U.S. at 203 (footnote omitted). *See also Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967) (issues not ripe although manufacturers faced suspension of certification of color additives which, in turn, would prohibit shipment of their products in interstate commerce).

Petitioner's final argument is that the Sixth Circuit misread *Mills v. Esmark*, 544 F. Supp. 1275 (N.D. Ill. 1982). Actually, the Court of Appeals quoted (Petitioner's Appendix at 36a) the following passage from *Mills*:

> Plaintiffs also fail to allege that any merger or acquisition of Esmark has taken place since the [severance] agreements became effective. Whether any future merger or acquisition would result in a waste or gift of corporate assets because of these purported agreements is a matter not ripe for consideration here.

Id. at 1290-91.

This holding from *Mills* hardly tends to support Petitioner's contention that "[i]n general, the judiciary has decided the legality of such fully executed [severance] agreements prior to any change in control." (Petition at 4.) We have searched in vain for a citation in the Petition to any decision which supports the Petitioner's assertion. Moreover, even if such a decision exists, if rendered under the circumstances of the instant case where employees' contingent rights to payments under the agreements have not accrued and may never accrue and the objections to the agreements are based only on speculation, such a case would have been wrongly decided and would be contrary to this Court's prior decisions.

There is no important question of federal law presented by the Petition. The courts below have not departed from the established principles for determining ripeness and no issue is raised in the Petition of any importance other than to the parties to this lawsuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed January 10, 1984)

CASE NO. C82-3148

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANN BROWN,
Plaintiff,

v.

FERRO CORP., *et al.*,
Defendants.

JUDGE JOHN M. MANOS

MEMORANDUM OF OPINION AND ORDER

On November 12, 1982, plaintiff, Ann Brown, filed the above-captioned derivative action against defendants, Ferro Corporation (Ferro) and its eleven (11) directors. In her complaint, Brown challenged four decisions made by the directors of Ferro: (1) the adoption of a Severance Agreement Program that would provide payments to certain key employees if their employment terminates within two years after a change in control, (2) the amendment of Ferro's Incentive Compensation Plan, (3) the adoption of a Performance Share Plan, and (4) the repurchase of a 22.4 percent block of Ferro's shares from Crane Co. Brown alleged that these decisions served no

legitimate purpose of Ferro or its shareholders. On July 22, 1983, the defendants filed a joint motion for summary judgment or, in the alternative, for dismissal. On August 8, 1983, Brown filed a response to the defendants' motion in which she indicated that she only wished to pursue her claims for damages and rescission based upon the adoption of the Severance Agreement Program. Memorandum of Plaintiff in Opposition to Joint Motion of Defendants at 2. On November 9, 1983, this court granted the defendants' motion to dismiss with respect to the adoption of the Severance Agreement Program, and dismissed Brown's remaining claims pursuant to Fed. R. Civ. P. 41(a)(2). The case is currently before the court on the defendants' motion to amend the Memorandum of Opinion and Order filed on November 9, 1983, in order to dismiss *with prejudice* plaintiff's claim concerning the repurchase of Ferro's shares from Crane. For the reasons that follow, their motion is granted.

As indicated above, after the defendants filed their motion for summary judgment on all claims, Brown stated that she would only pursue her claims concerning the Severance Agreement Program. Thus the court dismissed Brown's remaining claims under Fed. R. Civ. P. 41(a)(2), which provides in pertinent part:

> Except as provided in paragraph 1 of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The defendants now assert that, in order to prevent the hardship of relitigating the stock repurchase claim, the

court should dismiss this claim with prejudice. They add:

> From the inception of this case through September 30, 1983, lawyers for Ferro and the Individual Defendants have devoted over 3,500 hours on this case and the two other purported derivative actions. (Rasmussen Affidavit, ¶ 3.) Given the effort and expense that has been invested in litigating the merits (or lack thereof) of this case, Ferro and its Board of Directors earnestly submit that they should not be subject to the cost and expense of relitigating the repurchase transaction all over again.

Memorandum in Support of Motion to Amend at 4. Since the purpose of Rule 41(a)(2) is to prevent voluntary dismissals that unfairly affect the other side, 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2364 (1971), and since Brown has not challenged the defendants' motion to amend the court's previous Memorandum of Opinion and Order, Brown's claim concerning the repurchase of Ferro's stock should be dismissed with prejudice. *Accord Pace v. Southern Express Co.*, 409 F.2d 331 (7th Cir. 1969).

Accordingly, the court's Memorandum of Opinion and Order of November 9, 1983, are amended to the extent that Brown's claim concerning the repurchase of Ferro's stock is dismissed *with prejudice.*

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

OHIO REVISED CODE

§ 1701.41 Notice of meeting.

(A) Written notice stating the time, place, and purposes of a meeting of the shareholders shall be given either by personal delivery or by mail not less than seven nor more than sixty days before the date of the meeting unless the articles or the regulations specify a longer period: (1) to each shareholder of record entitled to notice of the meeting; (2) by or at the direction of the president or the secretary or any other person required or permitted by the regulations to give such notice. If mailed, such notice shall be addressed to the shareholder at his address as it appears on the records of the corporation. Notice of adjournment of a meeting need not be given if the time and place to which it is adjourned are fixed and announced at such meeting.

(B) Upon request in writing delivered either in person or by registered mail to the president or the secretary by any persons entitled to call a meeting of shareholders, such officer shall forthwith cause to be given to the shareholders entitled thereto notice of a meeting to be held on a date not less than seven nor more than sixty days after the receipt of such request, as such officer may fix, unless the articles or the regulations specify a longer period for such purpose. If such notice is not given within fifteen days after the delivery or mailing of such request, or such shorter or longer period as the articles or the regulations specify for such purpose, the persons calling the meeting may fix the time of meeting and give notice thereof as provided in division (A) of this section, or cause such notice to be given by any designated representative.

1701.60 Transactions between the corporation and its directors or officers

(A) Unless otherwise provided in the articles or the regulations:

(1) No contract or transaction shall be void or voidable with respect to a corporation for the reason that it is between the corporation and one or more of its directors or officers, or between the corporation and any other person in which one or more of its directors or officers are directors, trustees, or officers, or have a financial or personal interest, or for the reason that one or more interested directors or officers participate in or vote at the meeting of the directors or a committee thereof which authorizes such contract or transaction, if in any such case (a) the material facts as to his or their relationship or interest and as to the contract or transaction are disclosed or are known to the directors or the committee and the directors or committee, in good faith reasonably justified by such facts, authorize the contract or transaction by the affirmative vote of a majority of the disinterested directors, even though the disinterested directors constitute less than a quorum; or (b) the material facts as to his or their relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon and the contract or transaction is specifically approved at a meeting of the shareholders held for such purpose by the affirmative vote of the holders of shares entitling them to exercise a majority of the voting power of the corporation held by persons not interested in the contract or transaction; or (c) the contract or transaction is fair as to the corporation as of the time it is authorized or approved by the directors, a committee thereof, or the shareholders;

(2) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the directors, or of a committee thereof which authorizes the contract or transaction;

(3) The directors, by the affirmative vote of a majority of those in office, and irrespective of any financial or personal interest of any of them, shall have authority to establish reasonable compensation, which may include pension, disability, and death benefits, for services to the corporation by directors and officers, or to delegate such authority to one or more officers or directors.

(B) Nothing contained in subdivisions (1) and (2) of division (A) of this section shall limit or otherwise affect the liability of directors under section 1701.95 of the Revised Code.

§ 1707.78 [Merger or consolidation into domestic corporation.]

(A) Pursuant to an agreement of merger or consolidation between the constituent corporations as provided in this section, a domestic or foreign corporation and, if so provided, one or more additional domestic or foreign corporations, may be merged into a surviving domestic corporation, or a domestic corporation together with one or more additional domestic or foreign corporations may be consolidated into a new domestic corporation formed by such consolidation. If any constituent corporation is a foreign corporation, the merger or consolidation must also be permitted by the laws of each state under the laws of which any constituent foreign corporation exists.

(B) The agreement of merger or consolidation shall set forth:

(1) The state under the laws of which each constituent corporation exists;

(2) In the case of a merger, that one or more specified constituent corporations shall be merged into a specified surviving domestic corporation, and, in the case of a consolidation, that the constituent corporations shall be consolidated into a new domestic corporation. The name of the surviving or new corporation may be the same as or similar to that of any constituent corporation;

(3) All other provisions with respect to the surviving or new corporation which would be required in original articles of a domestic corporation filed at the time of adoption of the agreement, other than the statement with respect to initial stated capital. Such provisions may vary from those in the articles of any constituent corporation;

(4) All statements and matters required to be set forth by the laws of each state under the laws of which any constituent foreign corporation exists;

(5) In the case of a merger, a statement that the directors of the surviving corporation shall continue as such or, if there are to be any changes on or before the effective date of the merger, the names of the directors. In the case of a consolidation, the names of the first directors of the new corporation;

(6) The regulations of the surviving or new corporation, or a provision that the regulations of a specified constituent corporation shall be the regulations of the surviving or new corporation, with such amendments as may be set forth in the agreement;

(7) The name and address of the statutory agent upon whom any process, notice, or demand against any constituent corporation or the surviving or new corporation may be served;

(8) The terms of the merger or consolidation, the mode of carrying them into effect, and the manner and basis of making distributions to shareholders of the constituent corporations in extinguishment of or in substitution for their shares. Such distribution may be by way of shares of any class or classes of the surviving or new corporation, cash, securities, evidences of indebtedness, other property, or any combination thereof. No such distribution shall be effected if there is reasonable ground to believe that the surviving or new corporation would be rendered insolvent thereby.

(C) The agreement of merger or consolidation may also set forth:

(1) The effective date of the merger or consolidation, which may be on or after the date of filing the certificate;

(2) A provision authorizing the directors of one or more of the constituent corporations to abandon the proposed merger or consolidation prior to filing the certificate;

(3) The terms and classifications of the directors;

(4) A statement of, or a statement of the method of determining, the fair value of the assets to be owned by the surviving or new corporations;

(5) Any additional provision permitted to be included in the articles of a newly formed domestic corporation;

(6) Any additional provision necessary or desirable with respect to the proposed merger or consolidation;

(D) To effect the merger or consolidation, the agreemust be approved by the directors of each constituent corporation, and adopted by the shareholders of each con-

stituent domestic corporation other than the surviving corporation at a meeting of the shareholders of each such corporation held for the purpose. In the case of a merger, the agreement must also be adopted by the shareholders of the surviving corporation at a meeting held for the purpose, if one or more of the following conditions exist:

(1) The articles or regulations of the surviving corporation then in effect require that the agreement be adopted by the shareholders or by the holders of a particular class of shares of that corporation;

(2) The agreement conflicts with the articles or regulations of the surviving corporation then in effect, or changes the articles or regulations, or authorizes any action which, if it were being made or authorized apart from the merger, would otherwise require adoption by the shareholders or by the holders of a particular class of shares of that corporation;

(3) The merger involves the issuance or transfer by the surviving corporation to the shareholders of the other constituent corporation or corporations of such number of shares of the surviving corporation as will entitle the holders thereof immediately after the consummation of the merger to exercise one-sixth or more of the voting power of that corporation in the election of directors;

(4) The agreement of merger makes such change in the directors of the surviving corporation as would otherwise require action by the shareholders or by the holders of a particular class of shares of that corporation.

(E) Notice of each meeting of shareholders of a constituent domestic corporation at which an agreement of merger or consolidation is to be submitted shall be given to all shareholders of that corporation, whether or not they are entitled to vote, and shall be accompanied by a

copy or a summary of the material provisions of the agreement.

(F) The vote required to adopt an agreement of merger or consolidation at a meeting of the shareholders of a constituent domestic corporation is the affirmative vote of the holders of shares of that corporation entitling them to exercise at least two-thirds of the voting power of the corporation on such proposal or such different proportion as the articles may provide, but not less than a majority, and such affirmative vote of the holders of shares of any particular class as is required by the articles of that corporation. If the agreement would have an effect which, if accomplished through an amendment to the articles, would entitle the holders of shares of any particular class to vote on the adoption of such amendment, the agreement must also be adopted by the affirmative vote of the holders of at least two-thirds of the shares of such class, or such different proportion as the articles may provide, but not less than a majority. If the agreement would authorize any particular corporate action which under any applicable provision of law or the articles could be authorized only by or pursuant to a specified vote of shareholders, the agreement must also be adopted by the same affirmative vote as would be required for such action.

(G) At any time prior to the filing of the certificate of merger or consolidation, the merger or consolidation may be abandoned by the directors of any of the constituent corporations if authorized to do so by the agreement or by the same vote of shareholders as is required to adopt the agreement.

(H) If division (D) of this section does not require adoption of the agreement of merger by the shareholders of the surviving corporation, the approval of the agreement

by the directors of that corporation constitutes adoption by that corporation.

(I) If any constituent corporation is a foreign corporation, it shall comply with the applicable laws of the state under the laws of which it exists.

§ 1701.79 [Merger or consolidation into foreign corporation.]

(A) Pursuant to an agreement of merger or consolidation between the constituent corporations as provided in this section, a domestic corporation and, if so provided, one or more additional domestic or foreign corporations, may be merged into a surviving foreign corporation, or a domestic corporation together with one or more additional domestic or foreign corporations may be consolidated into a new foreign corporation to be formed by such consolidation in a state under the laws of which a constituent foreign corporation exists. The merger or consolidation must be permitted by the laws of each state under the laws of which any constituent foreign corporation exists.

(B) The agreement of merger or consolidation shall set forth:

(1) The states under the laws of which each constituent corporation exists, and, in the case of a consolidation, the state under the laws of which the new corporation is to exist;

(2) In the case of a merger, that one or more specified constituent corporations shall be merged into a specified surviving foreign corporation, and, in the case of a consolidation, that the constituent corporations shall be consolidated into a new foreign corporation. The name of the surviving or new corporation may be the same as or similar to that of any constituent corporation;

(3) All additional statements and matters with regard to the surviving or the new corporation, other than the name and address of the statutory agent, which would be required by section 1701.78 of the Revised Code if the surviving or new corporation were a domestic corporation;

(4) The location of the principal office of the surviving or new corporation in the state under the laws of which the surviving corporation exists or the new corporation is to exist;

(5) All additional statements and matters required to be set forth in such an agreement of merger or consolidation by the laws of each state under the laws of which any constituent foreign corporation exists and, in the case of a consolidation the new corporation is to exist;

(6) The consent of the surviving or the new corporation to be sued and served with process in this state, and the irrevocable appointment of the secretary of state as its agent to accept service of process in any proceeding in this state or to enforce against the surviving or the new corporation any obligation of any constituent domestic corporation, or to enforce the rights of a dissenting shareholder of any constituent domestic corporation;

(7) If it is desired that the surviving or the new corporation transact business in this state as a foreign corporation, a statement to that effect, together with a statement on the appointment of a statutory agent and with respect to service of any process, notice, or demand upon such statutory agent or the secretary of state, as required when a foreign corporation applies for a license to transact business in this state.

(C) The agreement may also set forth any additional provision permitted by the laws of any state under the laws of which any constituent corporation exists, consistent

with the laws of the state under the laws of which the surviving corporation exists or the new corporation is to exist.

(D) To effect the merger or consolidation, the agreement must be approved by the directors of each constituent corporation, and adopted by the shareholders of each constituent domestic corporation, in the same manner and with the same notice to and vote of shareholders or of holders of a particular class of shares, as is required by section 1701.78 of the Revised Code.

(E) At any time prior to filing the certificate of merger or consolidation, the merger or consolidation may be abandoned by the directors of any of the constituent corporations if authorized to do so by the agreement.

(F) Each constituent foreign corporation shall comply with the applicable provisions of the laws of the state under the laws of which it exists.

(G) If the surviving or new corporation does not desire to be licensed to transact business in Ohio, the agreement shall be accompanied by the affidavits, receipts, certificates, or other evidence required by division (H) of section 1701.86 of the Revised Code with respect to each constituent domestic corporation and, with respect to each constituent foreign corporation licensed to transact business in Ohio, the affidavits, receipts, certificates, or other evidence required by division (C) or (D) of section 1703.17 of the Revised Code.